BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE W. GANN Claimant	)	
VS.	)	
DRIVER MANAGEMENT, INC. Respondent	)	Docket No. 148,550
AND	)	
NATIONAL ADJUSTMENT COMPANY Insurance Carrier	)	

ORDER

Claimant requested review of the April 14, 2005 Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on August 24, 2005.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for claimant. Terri Z. Austenfeld, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant failed to prove by a preponderance of the evidence that his heart attack and disability resulted from a work-related external force or from exertion beyond that required by claimant's usual work.

The claimant requests review of (1) whether claimant met with personal injury by accident on June 23, 1990; (2) whether claimant's injury arose out of and in the course of

his employment with respondent; (3) claimant's average weekly wage; and (4) medical expenses and medical liens.

Respondent argues that the ALJ correctly found that claimant did not meet his burden of proving that he met with personal injury by accident arising out of the course and scope of his employment or that claimant's heart attack was caused by an external force.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed. The Award sets forth the ALJ's findings of fact and conclusions of law in some detail. It is not necessary to repeat those herein. The Board adopts the findings and conclusions of the ALJ.

On June 23, 1990, the Kansas City, Kansas, fire department received a call for emergency medical assistance. Robert McLaughlin, a captain with the fire department, along with his team, responded to the call. Upon arriving at the scene, Captain McLaughlin and his team found claimant lying on the ground beside his semi-tractor/trailer at the back portion of the tractor, even with the back dual tires of the tractor on the driver's side of the vehicle. Claimant had no pulse, was not breathing, and had a laceration on the back of his head. Captain McLaughlin did not recall seeing blood on the ground at the scene but recalled blood on the hand of another emergency medical technician (EMT) after he lifted the claimant's head. EMT's revived claimant using cardiac pulmonary resuscitation (CPR) and transferred him to a local hospital. Captain McLaughlin's report indicates that claimant had been seen earlier tarping his trailer, but no one witnessed what had occurred before finding claimant lying on the ground.

After being revived by CPR, claimant remained comatose. At the present time, he is confined to a wheelchair and cannot feed himself, clothe himself, or communicate in any effective manner. Claimant has never been able to tell anyone what happened to him on the date of his heart attack. It has been stipulated that claimant is permanently and totally disabled.

Claimant's step-sister, Janet Pope, testified that she is a bookkeeper, and she reviewed all the records and compiled a summary showing claimant's various expenses and income. Ms. Pope testified that claimant's father and step-mother had spent $60,514.33 in out-of-pocket expenses for which they have not been reimbursed. These expenses included travel expenses, health insurance premiums, clothing, and room and board at a nursing home. Ms. Pope also testified she charged $2,400 per year for four years for accounting fees. After 1995, Social Security took care of claimant's doctor bills, nursing home bills, and certain medicines.

Daniel D. Zimmerman, M.D., who is board eligible in internal medicine, reviewed claimant's medical records, the ambulance records, and the transcript of the deposition of Captain McLaughlin at the request of claimant's attorney. Dr. Zimmerman testified that claimant's brain damage was caused by the heart attack, not by a head injury. It is Dr. Zimmerman's opinion that claimant fell from his semi-trailer and the fall caused his heart attack. Dr. Zimmerman had no personal knowledge of the events of June 23, 1990, but based his opinion that claimant fell from the top of his truck on the fact that claimant had been seen earlier tarping his trailer and, later, was found near the rear wheel of the vehicle's tractor. Dr. Zimmerman did admit that claimant could have fallen at that spot without falling off the trailer. Dr. Zimmerman's opinion that claimant's heart attack was caused by the fall from the truck assumed that claimant fell from the trailer and that a fall occurred before the heart attack.

Claimant argues that the fall constituted an external force.

> To support a finding that claimant's cardiac or vascular injury is the product of some extreme external force, the claimant must prove (1) the presence of a substantial external force in the working environment and (2) there must be expert medical testimony that the external force was a substantial causative factor in producing the injury.[1]

> The goal of the heart amendment . . . is legitimate. It is not to deny compensation to claimants who suffer injury on the job, but rather to avoid requiring the employer to act as an absolute insurer of claimants whose death or disability was merely the result of the natural progress of disease and which coincidentally occurred at the workplace.[2]

Dr. Zimmerman also considered claimant's alleged fall an "unusual exertion" and testified that he found nothing to suggest claimant would fall on a regular basis during the course of his employment.

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.[3]

Dr. Zimmerman's opinions were based upon speculation and conjecture. As such, they are untrustworthy and are not persuasive. First, it is speculation that claimant fell off the semi-trailer while tarping the load. Second, the doctor's opinion that claimant's heart

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[1] *Mudd v. Neosho Memorial Reg. Med. Center*, 275 Kan. 187, Syl. ¶ 5, 62 P.3d 236 (2003).

[2] *Id.* at 199-200.

[3] K.S.A. 44-501(e).

attack occurred after the alleged fall, as opposed to before the alleged fall, lacks foundation. The Board finds claimant has failed to meet his burden of proving a compensable accident. Rather, this claim is barred by K.S.A. 44-501, the so-called heart amendment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 14, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I find this claim to be a compensable personal injury by accident that arose out of and in the course of claimant's employment with respondent.

Claimant had been observed on top of his trailer "tarping his truck"[4] within four or five minutes of when claimant was discovered unconscious on the ground beside the trailer. He had a laceration on the back of his head. When the fire department personnel arrived at the scene, claimant had no pulse and no respiration. He was revived but has been unable to communicate any details concerning his accident.

[4]McLaughlin Depo. at 10.

> [T]he rule in workmen's compensation cases is that the claimant is not required to establish his right to an award by direct evidence alone, or that he produce an eyewitness to the accident; and that *circumstantial evidence* may be used to establish the claim and it is not necessary that such evidence should rise to that degree of certainty as to exclude every reasonable conclusion other than that found by the trial court.[5]

Even proceeding from the premise that the cause of claimant's fall has not been established and is not known, unexplained falls are generally considered compensable.[6] Unexplained falls are a neutral risk and would not have occurred at work if claimant had not been working.[7] Even if claimant had some personal risk contributing to his fall, the injury is compensable because his subsequent heart attack would not have occurred absent the trauma due to falling from the height of the trailer.[8]

After reviewing "extensive records regarding Dale Gann"[9], Dr. Zimmerman concluded "that the fall triggered the heart attack."[10] That is, the spasm that caused claimant's artery to narrow to a sufficient degree that he developed an acute myocardial infarction resulted from the fall. Claimant suffered an accident and injury by falling from his trailer and, as a direct result of that trauma, he suffered a myocardial infarction.

Despite the questions raised and the concessions obtained during respondent counsel's cross-examination, Dr. Zimmerman's opinions concerning the most probable sequence of events and the causation of claimant's heart attack did not change. Moreover, Dr. Zimmerman's opinions are the only expert medical opinions in this case and, as such, his opinions are uncontroverted. Uncontradicted evidence which is not

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[5] *Pence v. Centex Construction Co.*, 189 Kan. 718, 725, 371 P.2d 100 (1962).

[6] 1 Larson's Workers' Compensation Law, § 7.04[1](2004).

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[8] *See Cox v. Refining Co.*, 108 Kan. 320, 195 Pac. 863 (1921); *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 349, 900 P.2d 857 (1995); and *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[9] Zimmerman Depo., Ex. 2.

[10] Zimmerman Depo. at 10.

improbable or unreasonable cannot be disregarded.[11] Dr. Zimmerman's testimony is not improbable or unreasonable. As such, it should be regarded as conclusive.

Because the fall did not result from the heart attack but instead the heart attack resulted from the trauma of the fall, the heart amendment is not applicable to this claim. Exertion from work was not the precipitating cause of the heart attack. Instead, it was the fall that caused the heart attack. The fall satisfies the definition of an external force. It is analogous to the examples in *Dial*[12] of a falling beam or a worker confronted by an armed assailant. Based upon the record presented, I find claimant has met his burden of proving a compensable accident and injury, including the injuries resulting from the heart attack.

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BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Terri Z. Austenfeld, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, Syl. ¶ 5, 573 P.2d 1036 (1978); *Anderson v. Kinsley Sand and Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976); *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 286, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *see also Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 232, 885 P.2d 1261 (1994), wherein the court said even evidence that is highly unlikely, if uncontradicted, must be assumed to be true.

[12] *Dial v. C.V. Dome Co.*, 213 Kan. 262, 267, 515 P.2d 1046 (1973).